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234-489—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 345

RALPH T. HICKEY, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–36) is reported at 360 F. 2d 127.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37) was entered on April 4, 1966. A petition for rehearing was denied (*ibid.*) on May 18, 1966. Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to July 15, 1966, and on July 14 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy to misapply and share in loans of a savings and loan association extended be-

yond the transfer of control of the bank by some co-conspirators to others.

2. Whether testimony regarding statements made by some of the conspirators prior to the formation of the conspiracy was properly admitted in evidence against all co-conspirators.

3. Whether the court's instruction on misapplication of bank funds exceeded the scope of the indictment.

4. Whether the trial judge unduly restricted cross examination when he instructed the jury to consider all evidence against all of the defendants at the close of the government's case.

STATEMENT

A three-count indictment charged the five petitioners with wilful misapplication of funds of a federally insured savings and loan association, participation in the proceeds of a loan with intent to defraud the association, and conspiracy to commit the substantive offenses in violation of 18 U.S.C. 371, 657 and 1006. After a jury trial in the United States District Court for the Northern District of Illinois, petitioners Hickey, Frank Graves, and James Graves were found guilty of all three counts. They were sentenced to imprisonment for concurrent five year terms and fined $5,000 on each count. Petitioner Kearns was convicted of the conspiracy count and was sentenced to imprisonment for two years and fined $5,000. Petitioner Heiderscheidt was convicted of conspiracy and fraudulent participation in the funds, and was sentenced to imprisonment for concurrent three year

terms and fined $5,000 on each count (A. 2).[1] The court of appeals affirmed (Pet. App. 37).

The conspiracy count (A. 3–4) alleged that defendant Hickey was an officer of Concord Savings and Loan Association between January 20, 1960 and November 2, 1960; that the defendant Kearns was a director of Concord from November 2, 1960 to October 9, 1961, and that the defendants Graves and Heiderscheidt were directors of Concord from November 2, 1960 to the return of the indictment. It charged them all with a conspiracy to misapply money of Concord and to share unlawfully in approximately $250,000 of the proceeds of specified loans. The overt acts alleged covered the period from January 20, 1960 to July 1963.

The evidence showed that, in January, 1960, petitioner Hickey acquired control and became the managing officer of the Concord Savings and Loan Association, in Chicago (A. 665). The board of directors that Hickey installed at Concord never failed to approve any loan that Hickey recommended (A. 102). In the late spring of 1960, Hickey decided to sell his interest in Concord for $250,000. Milton Price, a realtor and mortgage broker, learned that Hickey was willing to help generate cash for the purchase of his interest by causing Concord to make mortgage loans to the prospective buyer in an amount sufficient to pay for Hickey's interest (A. 46). Price shared office space with Frank and James Graves (father and son) who were real estate developers and with Heiderscheidt (Frank Graves' son-in-law) who was an accountant.

[1] "A." refers to Appellants' Appendix in the court of appeals.

Price told James Graves about Hickey's plans for disposing of Concord.

In July 1960 Price and petitioners James Graves, Frank Graves, Heiderscheidt, and Hickey met at the Concord offices (A. 486). At this and subsequent meetings, agreements were reached pursuant to which the Graveses and Heiderscheidt undertook to line up property to serve as collateral on which Hickey would cause Concord to loan money in an amount sufficient both to acquire the property and to pay Hickey $250,000 for the purchase of Concord by Frank Graves.

Shortly after the July, 1960, meeting, the parties viewed certain parcels of land in order to select property which could be used as collateral for the loan. They first inspected a 142 acre tract, known as the Hartman Farm, over which Frank Graves had come to exercise a substantial measure of control and to which, it was therefore believed, title could be readily obtained.[2] After inspecting Hartman Farm,

[2] The evidence showed that prior to 1960, Hartman Farm had been jointly owned by Hartman and Coquillard. In December, 1959, James and Frank Graves were approached by Coquillard, who offered to sell his one-half interest in the Hartman Farm for $10,000. Preliminary papers were drawn by James Graves at that time (A. 104–106, 465–466). On January 12, 1960, James Graves persuaded Coquillard and Hartman to deed the farm into a trust, naming Coquillard and Hartman as equal beneficiaries with an equal power of direction (A. 108–109). Thereafter James Graves induced Hartman to sign a similar trust agreement naming Hartman and Frank Graves as equal beneficiaries, with the sole power of direction in Frank Graves (A. 109, 134, Govt. Exhibit 2A). Hartman testified that this trust agreement was not completely filled in when he signed it, and that he believed its terms were similar to the first trust agreement,

Hickey expressed the belief that it would not provide sufficient collateral. The Graves group suggested the use of an additional parcel of forty acres of unimproved land known as the Schoolside Subdivision (A. 47, 491–492).

The parties determined that a loan of $350,000 was required to obtain clear title to both the Hartman and Schoolside properties and have enough left to purchase Hickey's interest (A. 498). Loan applications in that amount were fabricated in the name of Wood-Stream Construction Company—unbeknownst to the proprietors of that firm who had no interest in either Hartman Farm or Schoolside (A. 176–179). On August 8, 1960, the board of directors of Concord unanimously approved the loan applications for $295,000 on Hartman Farm and $55,000 on the Schoolside property (A. 41–42, Govt. Exh. 4B). After the loans were approved, efforts were made by the Graveses and Heiderscheidt to obtain a favorable ap-

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except that Frank Graves' name would be substituted for Coquillard (A. 134–135, 156–157). On February 4, 1960, Hartman signed various other documents at James Graves' request. Hartman assigned a 6% share of his interest in the Coquillard-Hartman trust to Frank Graves and agreed that he and Frank Graves would give each other the right of first refusal on their respective interests in the trust (Govt. Exh. 2C, A. 135–137, 148–149). Hartman received $1,500 for the assignment, which James Graves had computed on the basis of an appraisal by A. O. J. Baumann that Hartman Farm was then valued at $85,200 (A. 61, 477–478, Govt. Exh. 23). On February 15, 1960, Coquillard and Hartman realized that the blank documents they had signed had been prepared in such a way as to grant Frank Graves full power over the disposition of Hartman Farm. They sent a letter of protest to the bank which held the trust agreements and ordered the bank not to dispose of the trust res. (A. 109, 120–121, Govt. Exh. 2K).

praisal of Schoolside and Hartman Farm. On August 26, 1960, one appraiser told Frank Graves that his preliminary appraisal placed a value of $71,000 on Hartman Farm and $24,000 on Schoolside. Frank Graves told him not to bother reducing this appraisal to writing (A. 94–95). Three days later a second appraiser, Duffy, set the value of Hartman Farm at between $155,000 and $185,000, and refused a request by James Graves and Heiderscheidt to inflate the valuation to $400,000 (A. 187, 197). James Graves then prevailed upon M. A. Brown to appraise the property as if it were already improved. Brown produced an appraisal of $406,500 on Hartman Farm, as developed, and $70,500 on Schoolside, as improved lots after an expenditure of $50,000 for improvements (A. 808, Govt. Exh. 6, 12). The Brown appraisals were given to Hickey and Concord on September 1, 1960. Hickey, of course, knew that the properties were unimproved. On September 1, Frank Graves executed a $295,000 mortgage on the Hartman Farm and a $55,000 mortgage on Schoolside.

On August 23, 1960, (prior to the receipt of the Duffy appraisal) all of the petitioners except Kearns met with counsel and supplied them with an abbreviated version of the circumstances surrounding the prospective sale of Concord, representing that Duffy had appraised Hartman Farm and Schoolside at $600,000 (A. 654–655, 663–664). The lawyers were not aware that Concord had already approved the $350,000 loan to Wood-Stream Construction Company nor were they later informed of the actual results of Duffy's appraisel (A. 662). Operating on the facts revealed

to them, the lawyers set up a series of escrow agreements. The first provided for receipt of the proceeds of the loans from Concord, and disbursement of the money necessary to obtain title to Hartman Farm and Schoolside. The second escrow was designed to receive and hold the balance of the loan proceeds ($250,000) from the first escrow until control of Concord was transferred from Hickey to Frank Graves. A third escrow was set up in which Kearns placed securities valued at $40,000 to secure the successful completion of the Hickey-Graves contracts. Kearns later became a director of Concord when the Graves group assumed control (A. 727). Between September 29 and November 2, 1960, the $350,000 borrowed from Concord flowed through the escrows as planned, and on November 2, Frank Graves acquired control of Concord, and Hickey received $250,000 (A. 606, 689, Govt. Exh. 4C). At this time Frank Graves, Heiderscheidt, Kearns and Graves' daughter were elected directors of Concord (A. 606).

The fiscal year of Concord ended on September 30, 1960 (A. 613). During the first days of October, while Hickey was still in control and two months after Concord's board had approved the $350,000 loan to Wood-Stream, independent auditors arrived at Concord for their annual inspection. An auditor sent a routine letter to Wood-Stream to verify the loan, and received a negative reply (A. 173, 176, Govt. Exh. 15). Upon learning of this development, the Graves group prevailed upon their attorney to dispatch a letter, dated October 11, to the auditors, stating that his unnamed clients had on September 26, 1960, decided to

substitute Homer C. Fitzgerald, the owner of Shur Construction Company, in place of Wood-Stream as the developer, and that he regretted his delay in transmitting this information to the Concord file (A. 175, Govt. Exh. 30). Accompanying this attorney's letter was Fitzgerald's application for a construction loan. The auditors sent a confirmation letter to Fitzgerald, and received an affirmative reply (A. 173–174). Fitzgerald's reply, together with the attorney's letter and the M. A. Brown appraisal, satisfied the auditors.[3]

Following the audit, Concord's Schoolside and Hartman files underwent a number of changes. The attorney's letter of October 11 was removed, and replaced by a similar letter dated September 15 (A. 174, Def. Exh. 1–2). Another appraisal, which valued the Hartman Farm at $399,000 and Schoolside at $72,500, was placed in the files (Def. Exh. 3, 4).[4]

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[3] As early as July or August, Fitzgerald, who was in some financial difficulties, had been approached by the Graveses and Heiderscheidt with a view toward building on the Hartman Farm. At their request he had signed several documents, some blank. When prepared, these documents purported to reflect a purchase by Fitzgerald of Hartman Farm and Schoolside for $405,000 and an application for a $350,000 construction loan on these properties. Among the documents obtained from Fitzgerald in this manner was a loan-verification letter to the auditors (A. 233–246).

[4] These appraisals set forth values on an individual lot basis. Thus, Hartman Farm was divided into 188 possible lots, of which 132 were valued at $1600 and 36 at $1850, and 20 "lake frontage" lots at $2000 each. 1250 feet of business frontage was value at $65 per foot (A. 965). The appraiser testified that he observed a lake on the farm (A. 417–418, 452). There was no such lake (A. 63). Another expert appraiser testified that this manner of appraisal is "commonly used to inflate the total conclusion to a figure that is unrealistic" (A. 818).

Fitzgerald never added any improvements to the properties (A. 576). In February and March, 1961, Rayka Corporation undertook the development of the land and the payment of the loans (A. 577, 579–580). Rayka had been organized in December, 1960, by nominees of the Graveses; Kearns, a director of Concord, became its president in June 1961 (Govt. Exh. 26, 27). Rayka paid the interest on both loans and the principal on the Schoolside loan; it also received several construction loans from Concord (A. 744). In March, 1963, the principal on the Hartman loan became due, but was not paid. On July 17, 1963, with Heiderscheidt representing Concord and Kearns acting on behalf of Rayka, the time for payment of the principal was extended by 18 months (A. 596).

The FBI began an investigation into Concord's activities in February, 1961 (A. 277). A few days after Frank Graves had been contacted by an FBI agent, the Graveses and Heiderscheidt attempted to induce a bank officer at the American National Bank, trustee of the Schoolside property, to remove certain papers from the Schoolside files (A. 314). When this effort failed, assignments of the beneficial interest in the Schoolside trust were inserted into the trust file purporting to show that Fitzgerald's company had become the beneficial owner of the trust on September 23, 1960, prior to the disbursement of the Concord loan (A. 317–320, Govt. Exh. 3B, 3C, 3A–8, 3A–9). In 1962, when Hickey learned that an FBI agent had contacted Fitzgerald, he arranged a meeting, which was attended by James Graves, Kearns, Hickey, and Fitzgerald, during which Fitzgerald was offered all

the mortgage money he needed if he would "take the Fifth Amendment" (A. 211–212, 227, 267).

ARGUMENT

1. Petitioners argue (Pet. 15–22) that the conspiracy to misapply funds of Concord came to an end on November 2, 1960, when control of Concord was transferred from Hickey to the Graves group, so that it was error to admit against all petitioners evidence of events occurring after that date. This obviously was not the theory of the indictment, which alleged a conspiracy continuing from January 1960 until the return of the indictment and 15 overt acts in furtherance of the conspiracy between 1960 and 1963 (A. 3–5). The indictment thus clearly charged, as within the conspiracy to misapply and participate in funds of Concord, acts of the Graves group occurring after the 1960 transfer of control. Contrary to petitioners' suggestion, the indictment did not allege "a subsidiary conspiracy to conceal" continuing "after the central criminal purposes of a conspiracy have been attained" (*Grunewald* v. *United States*, 353 U.S. 391, 401–402). Nor did the trial judge charge the jury with respect to a subsidiary conspiracy (A. 888–898) (compare *Forman* v. *United States*, 361 U.S. 416). The theory of the indictment—and the theory on which the case was submitted to the jury—was that the conspiracy to misapply Concord's funds persisted for so long as the fraudulently procured and inadequately secured loans were outstanding. This theory, as the court of appeals recognized (Pet. App. 27), was amply supported by the evidence.

While Hickey was in control of Concord and a subservient board of directors interposed no restraint on his management of its affairs, the mere obtaining of funds from Concord hardly presented a challenge. The conspiracy was born of a shared desire to obtain Concord's funds by a scheme of devices that would cloak the unlawful misapplication and participation with an appearance of legitimacy. The conspiracy contemplated from the outset that the tracts, offered as collateral for the loans, would be subdivided and developed so that the large debt to Concord could be retired by the repayment of smaller individual loans, which would be assumed by prospective home buyers. Since the method of inflating the collateral was to get appraisals based on the prospective development of vacant land, some effort at development was obviously essential if the scheme was to succeed. Thus, such acts as the formation of Rayka in 1961 when Fitzgerald proved unable to develop Hartman Farm and the obtaining of an extension to permit more time for the repayment of the loans were clearly in furtherance of the conspiracy charged.

The investigation by the FBI, which commenced in 1961 while the development of the collateral was still in progress, evoked from the conspirators more strenuous efforts to preserve appearances, but did not alter the fundamentals of the plan. Indeed, the response to the FBI investigation—the attempts to alter files and to quiet Fitzgerald—was quite similar to the earlier, and more successful, effort to cope with the auditors whose random loan-verification letter of October 1960 had disclosed Wood-Stream's non-participa-

tion. In sum, the various measures in which each of the conspirators engaged in 1961 and 1962 were merely adaptations of the on-going plan to the exigencies of the situation. This case is thus not like those on which petitioners rely (*Krulewitch* v. *United States,* 336 U.S. 440, *Lutwak* v. *United States,* 344 U.S. 604, and *Grunewald* v. *United States,* 353 U.S. 391) which hold that a subsidiary conspiracy to conceal may not be inferred from evidence that the original conspiracy was kept secret and the conspirators took care to cover up their crime to escape detection. The acts here involved did not occur after the conspiracy had ended, but while it was going on.[5] The fact that the particular method of covering was not within the contemplation of the parties when they first laid their plans does not render their acts outside the scope of the conspiracy so long as the basic conspiracy was still in existence. Acts of concealment in furtherance of the main criminal objective are admissible evidence. *Grunewald* v. *United States,* 353 U.S. at 405; *Forman* v. *United States,* 361 U.S. 416; *United States* v. *Klein,* 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924; *Mount* v. *United States,* 333 F. 2d 39 (C.A. 5), certiorari denied, 379 U.S. 900.[6]

[5] There was here no reliance on acts of concealment to extend the statute of limitations. The indictment was returned well within the applicable period even if the conspiracy had ended—as it did not—on November 2, 1960.

[6] Petitioners' objections to the admission of other post-1960 evidence (see Pet. 10) are ill-founded. The evidence as to a lawsuit by Coquillard against Graves was introduced by the defense (A. 126–127) and was mentioned by the government only on redirect (A. 129–130). Fitzgerald's testimony that he was suing Graves also came in on redirect (A. 268–271) after

Petitioners also argue that, on the government's theory that the conspiracy continued after the transfer of control in November, 1960, it was error to exclude evidence of repayment of the loans by which the transfer of control over Concord was effected. Testimony by Frank Graves that Rayka paid the Schoolside loan was admitted without objection (A. 580). The repayment of the Hartman Farm loan, however, was alleged to have occurred in September, 1964, after indictment and on the eve of trial, *i.e.*, long after the conspiracy charged in the indictment. The trial judge heard evidence outside the presence of the jury that this loan was written off in September, 1964, when Concord merged with another savings and loan association (A. 772–773). Under the circumstances, he properly ruled the evidence inadmissible for, not only did it occur after indictment, but the manner in which that loan was retired would have raised collateral issues in a case already complicated by the devious methods used by petitioners to effectuate their scheme.

2. Petitioners contend (Pet. 23–25) that it was error to admit, as against all defendants, testimony regarding conversations which took place before Hickey met the Graves group. In particular they object to the testimony concerning the steps by which Frank Graves acquired a measure of control over

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the defense counsel had brought out that Fitzgerald had talked to an attorney, Lasswell, who was involved in other litigation against Graves (A. 222–223, 238, 242). Fitzgerald had given Lasswell documents when he retained him to sue Graves (A. 247). Thus it was petitioners themselves who brought the civil litigation into the case.

Hartman Farm—concededly, prior to the commencement of the conspiracy. Petitioners' argument misconstrues the function of such evidence in this case. None of the testimony objected to was introduced to prove the truth of the matter stated, but merely served as background material essential to set the stage for the conspirators to effect their plan (A. 12–13). Without that background, many of the events occurring after the conspiracy was under way would be wholly unintelligible. The pre-June 1960 evidence served to explain the ability of Frank Graves to offer the Hartman Farm as collateral for the loan from Concord. The tenuousness of the control which Graves could exercise over the farm materially affected the security which Concord obtained by taking a mortgage on the property. The evidence also served to refute later testimony regarding the valuation placed upon the collateral by the conspirators. In short, the conspiracy was inextricably entwined in, and inexplicable without, the history of the acquisition of the collateral. See *United States* v. *Postma,* 242 F. 2d 488 (C.A. 2), certiorari denied, 354 U.S. 922; *United States* v. *Mesarosh,* 223 F. 2d 449, 454–455 (C.A. 3), reversed on other grounds, 352 U.S. 1; *United States* v. *Dennis,* 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494.

3. The claim, raised for the first time on appeal (see Pet. App. 35, n. 32), that the trial judge erred in its instruction concerning count 2 of the indictment (Pet. 25–28) affects only the fines of the three petitioners convicted on that count, since the prison

sentences are concurrent.[7] It is, in any event, without merit. The indictment charged in count 2 (A. 5–6) that Hickey directly, and the others as aiders and abettors, misapplied the funds of Concord with intent to defraud Concord, in that Hickey, "by reason of his position and by virtue of the power" he had over Concord, fraudulently caused the approval of the designated loans "well knowing" that Concord "did not receive sufficient collateral to secure" them. This language manifestly put the defendants on notice that Hickey was being charged with procuring the designated loans in a fraudulent manner through the use of his authority and control. As the court below held (Pet. App. 32–35) the instruction on what acts constitute a wilful misapplication did not enlarge the substantive charge of the indictment, but properly served as an explanation of a statutory term in light of the evidence presented. See *United States* v. *Alaimo,* 297 F. 2d 604, 606–607 (C.A. 3), certiorari denied, 369 U.S. 817; *United States* v. *Bernard,* 287 F. 2d 715 (C.A. 7), certiorari denied, 366 U.S. 961.

4. Petitioners contend that they were denied an opportunity to cross-examine government witnesses whose testimony, initially offered against one or more of the defendants, was held applicable to all of them when the trial judge was satisfied that there was sufficient evidence to connect all of them with the conspiracy (A. 345). The government's request at the

[7] Contrary to petitioners' contention (Pet. 27–28), the language of count 1, charging in part a conspiracy to wilfully misapply, is broad enough to encompass any of the means of misapplication as defined by the judge (A. 3–4, 898–899). Misapplication is not an element of the third count (A. 900).

close of its case that the court instruct the jury that all of the evidence in the record be regarded as applicable to all of the defendants was hardly out of the ordinary. Counsel for Frank Graves and Heiderscheidt acknowledged that "it certainly does not come as a surprise to us that the government makes this motion at this time" (A. 326). Nevertheless counsel for Hickey objected that "to now inform the jury that evidence which was admitted in a restricted fashion may now be considered against all of the defendants is to deprive the defendant Hickey of his right of cross-examination", (A. 335). That objection was completely answered by the trial judge (A. 339):

> The Court: * * * These lawyers were all given the fullest opportunity for cross examination. Furthermore, the lawyers availed themselves of the opportunity and I agree that Mr. Callaghan [Hickey's counsel] availed himself of it most extensively.

Accordingly, the court properly instructed the jury as follows (A. 345):

> The Court: Ladies and gentlemen of the jury, I instruct you that all the evidence which you have heard and or seen, given through the witnesses here will now be considered by you as to all of the defendants.

The procedure adopted by this court is not novel. See *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), 340 F. 2d 254 (C.A. 7), certiorari denied, 381 U.S. 911; *United States* v. *Baxa*, 340 F. 2d 259 (C.A. 7), reversed on other grounds, 381 U.S. 353. See also *United States* v. *Dennis*, 183 F. 2d 201, 230–231 (C.A.

2), affirmed, 341 U.S. 494. Defense counsel, no strangers to the trial arena, were aware of the requirement that the conspiracy had to be proved before testimony initially admitted as to less than all of the co-conspirators could be considered against the remaining defendants. They were also aware of the practice of limiting testimony to particular persons named until the existence of a conspiracy is established. As noted by the trial judge and the court of appeals (Pet. App. 35), each defense counsel cross-examined several witnesses whose testimony was not applicable to his client when offered. For example, the court limited Coquillard's testimony to Frank and James Graves, yet Coquillard was cross-examined by counsel for all of the defendants (A. 103–132). Counsel for Hickey examined witness Duffy extensively, although his testimony was originally limited to James and Frank Graves and Heiderscheidt (A. 190). Kearns' counsel examined witness Squires whose testimony was originally applicable only to Hickey, Frank and James Graves (A. 289, 300). The court did not restrict cross-examination by any counsel at the time the witnesses testified. Even if the argument of counsel regarding the motion to instruct the jury to consider all testimony against all witnesses can be interpreted as containing a motion by defense counsel to re-open cross-examination, the court did not abuse its discretion in rendering its ruling that counsel had already had sufficient opportunity to examine the witnesses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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